IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.04.2005

Coram :

THE HONOURABLE MR.JUSTICE P.SATHASIVAM

and

THE HONOURABLE MR.JUSTICE S.K.KRISHNAN

Habeas Corpus Petition No.1465 of 2004

S.Syed Ali Fathima ... Petitioner

v.

1. The Secretary to Government of Tamil Nadu,
   Public (SC Department), Secretariat,
   Chennai 600 009.

2. The Secretary to Government of India,
   Ministry of Finance,
   Department of Revenue (COFESPOSA Unit),
   Central Economic Intelligence Bureau,
   Janpath Bhavan, "B" Wing, 6th Floor,
   Janpath, New Delhi 110 001.

3. The Superintendent of Central Prison,
   Chennai 600 003. ... Respondents

Habeas Corpus Petition filed under Article 226 of the Constitution of India for the issue of writ of habeas corpus calling for the records of the first respondent relating to G.O. No. SR.1/1327-3/2004 Public (SC) Department dated 04.11.2004, and quash the same, and direct the respondents to produce the body of the Detenu Sheik Abdulla, Son of Abdul Rasheed, now detained in the Central Prison, Chennai, under Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act before this Honourable Court and set him at liberty forthwith.

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For Petitioner : Mr.B.Kumar, Senior Counsel,
for Mr.M.Abdul Nazeer.

For Respondents 1 & 3: Mr.A.Kandasamy,
Additional Public Prosecutor

For Respondent 2 : Mrs.Vanathi Srinivasan

ORDER

(Order of the Court was made by
P.SATHASIVAM, J.)

S.Syed Ali Fathima, wife of the detenu Sheik Abdulla challenges the order of detention dated 04.11.2004 passed under Section 3(1)(i) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFESPOSA Act, in short).

2. Heard Mr.B.Kumar, learned Senior Counsel for the petitioner as well as the counsel appearing for respondents 1 and 3 and the counsel appearing for the second respondent.

3. Though several contentions have been raised for quashing the impugned order of detention, learned senior counsel appearing for the petitioner, at the foremost, contended that the detaining authority has committed an error in shifting the burden of proof on the detenu by referring to Section 123 of the Customs Act, 1962. In support of the above contention, he relied upon the earlier decision of the Division Bench in the case of Gunasundari v. State of Tamil Nadu, 2003-2-LW (Cri) 884.

4. Per contra, the learned Additional Public Prosecutor, by drawing our attention to the paragraph (iv) of the Grounds of detention, would submit that the goods seized from the detenu is liable to be confiscated not under Section 123 of the Customs Act, 1962, but under various other Sections 111(d), 111 (1) and 111(m) of the Customs Act, 1962. In such circumstances, according to him, the presumption of burden referred to under Section 123 of the Act does not apply to the detenu.

5. We have carefully considered the grounds of detention and the submissions. In order to appreciate the contention put-forward by the learned Senior Counsel for the petitioner, it is relevant to refer to the specific reference made in the grounds of detention, which reads as under :

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"In view of the above legal provisions, the baggage containing the above goods of foreign origin in trade quantity do not correspond to a bona fide passenger baggage and the goods under seizure are liable to confiscation under Section 111(d), 111(1) and 111(m) of the Customs Act, 1962 read with Section 123 of the Customs Act, 1962. Further, by the above said acts knowingly done by you, you are liable to penal action under Section 112 and punishment under Section 132 and 135 of the Customs Act, 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act, 1992. The burden of proving the licit nature of the goods seized from your baggage lies on you. The act of rendering the goods under seizure liable to confiscation under Section 111 of the Customs Act, 1962 amounts to smuggling as per the provisions of Section 2(39) of the Customs Act, 1962."

6. A perusal of the above reference makes it clear that it cannot be claimed that no reference to Section 123 of the Customs Act, is made. In this regard, it is relevant to refer to the judgment of the Division Bench in the case of Gunasundari v. State of Tamil Nadu, 2003-2-LW (Cri) 884. In a similar circumstance, a contention was raised in that case, namely, the detaining authority has no power to invoke the presumption under Section 123 of the Customs Act, 1962 in violation of the Articles 21 and 22(5) of the Constitution of India and thereby, the subjective satisfaction of the detaining authority is vitiated.

7. While considering this contention, the Division Bench referred to the judgment of the Constitution Bench of the Supreme Court in the case of Collector of Customs v. Sampathu Chetty, AIR 1962 SC 316, wherein the Supreme Court concluded that,

"Nevertheless, it is manifest that at the stage of adjudication (when only the rule of evidence laid down by this Section comes into operation), the very facts which led the seizing officer to effect the seizure as distinguished from their significance as affording reasonable belief for the seizing officer to hold that the goods are smuggled are before the adjudicating officer."

8. It is relevant to note that Section 178A of the Sea Customs Act, 1878, which was considered by the Constitution Bench of the Supreme Court, is in pari materia with Section 123 of the Customs Act, 1962. In such circumstances, the earlier Division Bench has rightly applied the principle laid down in

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the said decision. In a subsequent decision, the Supreme Court has, in the case of Shalini soni v. Union of India, (1980 Crl.LJ 1487), held that the inference drawn by the seizing officer cannot be imported to that of the detaining authority and the burden of proof will not be available and cannot be invoked while passing the order of detention without any materials whatsoever.

9. In the light of the legal position as mentioned above and in view of the categorical assertion made in the grounds of detention, we hold that the order of detention impugned in this habeas corpus petition is liable to be set aside and it is accordingly set aside. The habeas corpus petition is allowed. The detenu is directed to be set at liberty forthwith, if he is not required for any other case.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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Copies to

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   Central Economic Intelligence Bureau,
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   Janpath, New Delhi 110 001.

3. The Superintendent of Central Prison,
   Chennai 600 003.

4.The Joint Secretary to Government,
  Public (law and order)
  Fort St. George,
  Chennai-9

5.The Public Prosecutor,
  High Court,
  Madras-104

+1cc to M/S M.Abdul Nazeer,Advocate SR.No.18308

+1cc to M/S Vanathi Srinivasan,ACGSC SR.No.18451
MAB(CO)
Kaa 28.04.

HCP.No.1465 of 2004

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